

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

NEIL J. CONLEY,

Plaintiff,

vs.

Civil Action 2:10-CV-444  
Judge Sargus  
Magistrate Judge King

THE UNITED STATES, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court on plaintiff's motion to compel. *Motion to Compel Discovery*, Doc. No. 50 ("*Motion to Compel*"). For the reasons that follow, the *Motion to Compel* is denied.

**I. BACKGROUND**

This case arises from a physical altercation that occurred in January 2000, when plaintiff was a civilian employee of the Department of Defense in Germany. *Amended Complaint*, Doc. No. 17, p.1. Plaintiff was apparently "titled" - *i.e.*, listed as a person who is the subject of a criminal investigation - with the offenses of simple assault and bodily injury. *Id.* p.3. Plaintiff alleges that he was not advised of this action at the time, *id.*, and only learned of these facts in 2007 during the course of a background check. *Id.* pp. 9 - 10. His subsequent request that his record be amended was denied.

The only claims remaining in this action are (1) plaintiff's claim under the Privacy Act, 5 U.S.C. §552a, for review of the decision not to amend the military police report, which plaintiff contends is inaccurate, and (2) plaintiff's claim under the Freedom of Information Act, 5 U.S.C. §552, that the Army is withholding requested records on titling statistics that were the subject of proper FOIA requests. *Opinion and*

Order, Doc. No. 38, p. 15.

Plaintiff's *Motion to Compel* seeks further response to Interrogatory Nos. 3 through 5, which concern "titling" statistics that plaintiff believes are gathered or maintained by components of the Department of Defense ["DOD"]. Specifically, Interrogatory No. 3 asks defendants to identify "[w]hich Department of Defense ('DOD') components . . . gather and record - or have gathered and recorded in the past - statistics on titling, indexing, military investigations, and/or requests, denials, and/or granting of requests for amendment of military criminal records . . . ?" *Exhibit 1*, p. 3, attached to *Motion to Compel*. Interrogatory No. 4 asks defendants to identify "the nature of the statistical information gathered and recorded by DOD components." *Id.* Interrogatory No. 5 asks defendants to identify whether "[Defendant Philip] McGuire, as Director, USACRC, [was] obligated to follow AR-25-55, Department of the Army FOIA Program, paragraph 1-508, Referrals." *Id.* p. 4. Plaintiff seems to accept that defendants have now provided the information sought by Interrogatory No. 5. *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion to Compel Discovery* ["*Plaintiff's Reply*"], Doc. No. 53, p. 2, and the Court will therefore not further address Interrogatory No. 5.

In their responses to plaintiff's interrogatories, defendants argued that the requested information is not relevant to plaintiff's remaining claims; defendants also represented that

[t]he U.S. Army Criminal Investigation Command . . . does not gather and record, nor does it maintain any records that contain statistics on titling, indexing, military investigations, requests for amendment of military criminal records, Reports of Investigation or on the number of requests for amendment of military records that were granted . . . ."

*Declaration of Susan Cugler, Director, U.S. Army Criminal Investigation*

*Command, Crime Record Center, Exhibit A, attached to Defendants' Motion for Summary Judgment, Doc. No. 56.*<sup>1</sup> Plaintiff's *Motion to Compel* is apparently grounded on plaintiff's belief that the Department of Defense, or some component thereof, does in fact gather and maintain titling statistics, as evidenced by the production by the Inspector General's Office of such statistics for the years 2003 through 2010. See *Exhibit 1, p.2, attached to Plaintiff's Reply*. "Plaintiff has good reason to assume that some DOD component, if not the DOD Inspector General, has gathered and maintained titling statistics for the decades prior to 2003." *Plaintiff's Reply, p. 3.*

## II. ANALYSIS

A party may file a motion to compel discovery if the opposing party fails to respond to a discovery request or provides "an evasive or incomplete disclosure, answer, or response." Fed. R. Civ. P. 37(a). However, a party moving to compel must first certify that he "has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." *Id.*; see also S.D. Ohio R. 37.2. In their response to the *Motion to Compel*, defendants argue that plaintiff failed to exhaust all extra-judicial means of resolving the dispute prior to filing the motion. *Defendants' Response in Opposition to Plaintiff's Motion to Compel Discovery* ["*Defendants' Response*"], Doc. No. 52. Plaintiff concedes as much, but notes that he had discussed these discovery requests with defense counsel during the course of a conference with the Court and "believed he had certified his belief that he had sufficiently conferred" with defense counsel by signing the *Motion to Compel*. *Plaintiff's Reply,*

---

<sup>1</sup>This declaration was apparently submitted in response to plaintiff's Interrogatory No. 2 and incorporated by reference in defendants' responses to Interrogatory Nos. 3 - 4. Plaintiff's *Motion to Compel* does not include the complete version of the declaration, which was also attached to *Defendants' Motion for Summary Judgment*.

pp. 1 - 2. Plaintiff simply has not satisfied the exhaustion and certification prerequisite to the filing of a motion to compel. In any event, however, the Court concludes that the *Motion to Compel* is without merit.

A party may not move to compel discovery on the basis of a mere suspicion that the producing party has additional information that it failed to disclose. *Harris v. Koenig*, 271 F.R.D. 356, 370 (D.D.C. 2010) ("I cannot compel what does not exist. If plaintiffs are speculating that documents responsive to these requests do exist, there must be a reasonable deduction that that is true, and not a mere hunch."); *Hubbard v. Potter*, 247 F.R.D. 27, 29 (D.D.C. 2008) ("Courts supervising discovery are often confronted by the claim that the production made is so paltry that there must be more that has not been produced or that was destroyed. Speculation that there is more will not suffice . . . ."). In this context, a party's failure to "show[] that a producing party is in fact in possession of [certain information] is grounds to deny a motion to compel." *Peavey v. University of Louisville*, NO. 3:09-CV-00484-R, 2011 WL 1106751, \*2 (W.D.Ky. Mar. 23, 2011) (internal quotation marks omitted).

The information upon which plaintiff relies in moving to compel the production of additional statistics, *i.e.*, the production by the DOD Inspector General of titling statistics for the years 2003 forward, does not support plaintiff's "assum[ption] that some DOD component, if not the DOD Inspector General, has gathered and maintained titling statistics for the decades prior to 2003." *Plaintiff's Reply*, p. 3. In its communication with plaintiff, the Office of the Inspector General expressly stated that "statistics on titling have only been maintained by the Department of Defense, Office of the Inspector General . . . since Fiscal year (FY) 2003." Exhibit 1, p. 2, attached to *Plaintiff's Reply*.

Ms. Cugler, the Director of the U.S. Army Criminal Investigation Command, Crime Record Center, whose declaration was submitted in response to plaintiff's interrogatories, averred that her office does not gather or maintain statistics on titling or indexing. Exhibit A, attached to *Defendants' Motion for Summary Judgment*. In defendants' response to the *Motion to Compel*, defense counsel makes the following representation:

In an effort to promote judicial economy, agency counsel for the Army contacted the Department of Defense Inspector General's Office and the Department of Defense Office of General Counsel to verify that the Department of Defense does not maintain the information Plaintiff[] seeks in his interrogatories. As such, counsel for Defendants can represent that in response to interrogatories 3 and 4 that the Department of Defense and its other components do not maintain statistics on titling.

*Defendants' Response*, p.4. Under these circumstances, there is simply no reason to believe that plaintiff's *Motion to Compel* in this regard is based on anything other than rank speculation. Such speculation, however, cannot form the basis of an order to compel.

Plaintiff's *Motion to Compel Discovery*, Doc. No. 50, is therefore **DENIED**.

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge

November 4, 2011  
(Date)

